

NOT DESIGNATED FOR PUBLICATION
ARKANSAS COURT OF APPEALS
D.P. MARSHALL JR., Judge

DIVISION I

CACR06-413

14 February 2007

ANTHONY D. WHITE

APPELLANT

v.

STATE OF ARKANSAS

APPELLEE

AN APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT
[CR-04-2070]

HONORABLE WILLARD
PROCTOR JR, JUDGE

REVERSED and DISMISSED

D.P. MARSHALL JR., Judge

This case turns on whether the State proved that a defendant constructively possessed narcotics found on top of the kitchen cabinets in a jointly occupied apartment. After a bench trial, the circuit court convicted Anthony D. White of possessing controlled substances with the intent to deliver those drugs and of possessing some drug paraphernalia. White appeals, arguing insufficiency of the evidence. We give the circuit court's judgment the benefit of the entire record and

all reasonable inferences from that evidence. *Loar v. State*, ___ Ark. ___, ___ S.W.3d ___, 2006 WL 3478381 (November 30, 2006). We hold, however, that substantial evidence does not establish White's constructive possession of the contraband, and reverse White's conviction on all the charges.

A confidential informant made two controlled buys at a North Little Rock apartment in late December 2003 and early January 2004. The apartment was leased to Deana Alves. Also in early January, the circuit court issued a search warrant for the apartment. The warrant contained no description of the drug seller. Almost a month later, police officers executed the warrant. No one was home. On top of a kitchen cabinet, the officers found approximately two grams of cocaine, approximately three grams of marijuana, and rolling papers. The officers also found items belonging to White in the apartment. These items included several papers addressed to him, photographs of White taken outside the apartment, and documents showing that he had been imprisoned for robbery and second-degree murder. During the search, Alves's children got home from school and used their key to get in the apartment.

Both Alves and White were charged with possessing the drugs and intending to deliver them. When police officers arrested White after the search, he did not have any contraband on his person. He did possess a travel permit because he was on

parole in Jefferson County. The permit allowed him to stay at Alves's apartment starting in mid-February 2004 so he could attend Pulaski Technical Institute.

The State tried Alves and White together. White did not testify. Alves testified that White had been her boyfriend, and had been staying in the apartment in late 2003 and early 2004 in violation of his parole. Alves said she was not tall enough to reach the top of the kitchen cabinets and did not routinely use that space. There was no proof of White's exact height, but one of the photographs showed that he is several inches taller than Alves. She testified that neither she nor any of her children used illegal drugs. She said none of them had ever seen drugs inside the apartment. Alves also testified that she, her children, White, and the apartment manager had keys to this apartment.

After hearing all this evidence, the circuit court acquitted Alves, held that White constructively possessed the contraband, and convicted him of all the charges. The court correctly recognized that this is a joint-occupancy/constructive-possession case. Therefore, the State had to prove beyond a reasonable doubt that White exercised care, control, and management over the contraband and knew he possessed contraband. *Embry v. State*, 302 Ark. 608, 611, 792 S.W.2d 318, 319 (1990).

In *Embry*, the supreme court held that the defendant did not constructively possess drugs found in a house where he stayed frequently and kept clothes. The

court reached this conclusion because Embry had no ownership interest in the house, was not present when it was searched, and had no controlled substance on his person at the time of his arrest. 302 Ark. at 611, 792 S.W.2d at 320. This case is similar. White stayed frequently at Alves's apartment, but his name was not on the lease and he did not have a superior or equal right to control the premises. Like Embry, White was not present when the apartment was searched and did not have any controlled substance on his person at the time of his arrest.

The circuit court convicted White based solely on circumstantial evidence. Therefore, we must consider whether that evidence indicated White's guilt and excluded all other reasonable hypotheses about who possessed the drugs. *Ewings v. State*, 85 Ark. App. 411, 416, 155 S.W.3d 715, 718 (2004). Whether circumstantial evidence excludes every other reasonable hypothesis is usually a question for the fact finder; when the evidence leaves the fact finder to speculate, however, that evidence is insufficient as a matter of law. *Ibid.*; see also, *Duncan v. State*, 38 Ark. App. 47, 49, 828 S.W.2d 847, 848–49 (1992). We hold that the evidence connecting White to this contraband was too thin to support his conviction.

Although the police found items belonging to White in the apartment, they found the contraband in a common area—the kitchen. None of White's possessions were found with the controlled substances. There were no fingerprints on the

contraband. There was no proof about the person the informant bought drugs from. Alves acknowledged that, with a chair, even a short person could reach the top of the kitchen cabinets. White had a key to the apartment; so did Alves's oldest children (ages ten and eleven), the apartment manager, and Alves. Thus other people besides White had access to this apartment and the top of the kitchen cabinets. "Circumstances, however strong they may be, ought never coerce the mind of the [finder of fact] to a conclusion of guilt if they can be reconciled with the theory that one other than the defendant has committed the crime, or that no crime has been committed at all." *Carter v. State*, 324 Ark. 395, 402, 921 S.W.2d 924, 927 (1996) (quotation omitted). Without speculating, the fact finder could not conclude that the contraband belonged to White.

The State suggests that White's living at the apartment in violation of his parole helps bridge the evidentiary gap between White and the drugs. We disagree. Where persons jointly occupy premises where contraband is seized, some additional facts must link the accused to the contraband. *Embry*, 302 Ark. at 611, 792 S.W.2d at 319. White's parole violation proves he broke the law in another way; it does not prove or create a reasonable inference that he is the one who broke the law by possessing these drugs.

Reversed and dismissed.

HART and HEFFLEY, JJ., agree.